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Supreme Court of the United States

OCTOBER TERM, 1944.

No. 784.

CARLTON R. BENTON, ADMINISTRATOR OF THE ESTATE OF WILLIAM L. DEVER, DECEASED, PETITIONER,

VS.

ST. LOUIS-SAN FRANCISCO RAILROAD COMPANY, A CORPORATION, RESPONDENT.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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STATEMENT.

Due to the fact that petitioner's statement of the case is not direct and concise and does not fairly present the facts under which the Supreme Court of Missouri found that plaintiff's evidence was so contrary as to physical facts as to be unbelieveable, and not sufficient to support a verdict for the plaintiff, and therefore should

be disregarded, counsel for respondent desire to call the court's attention to the following facts.

In the petition under which the cause was tried, it was alleged by plaintiff as follows:

> "That the instrumentalities used in connection with such tracks were two switch points connected by what is known as a bridle rod in such manner that said switch points could be simultaneously moved in an easterly and westerly direction and a constant distance at the same time maintained between them, and that said bridle rod and said switch points, in turn, were attached to a connecting rod extending therefrom in an easterly direction from said switch tracks to a switch stand throw lever, to which it was connected at a point several inches from where said switch stand throw lever was attached to a fixed fulcrum, being a metal plate fastened to two cross-ties or head blocks extending westwardly from said switch stand to and under said switch points and the rails of said switch tracks adjacent thereto, and approximately eighteen inches west of the west track thereof, the opposite end of said switch throw lever being free and having a large metal ball thereon, said connecting rod being attached to said lever in such a manner that when said free end of said switch throw lever was swung, thrown, or moved toward said switch tracks and said switch points, said points would move to the west and permit cars to be moved freely from said Brockett spur switch track on to the tracks of said Drake's spur, and when said switch stand throw lever was swung, thrown or moved away from said switch tracks said switch points would move toward the east and permit the movement of cars freely back and forth over said Brockett spur switch track and switch points, without interference by said Drake's spur track."

Plaintiff further alleged that he was unable to determine the cause of his injury and had no knowledge or means of knowing the cause or causes which operated to bring about the unusual and extraordinary movement of the switch throw lever from the east to the west which he claimed caused his injury. He alleged that as the engine upon which he was riding approached the switch the throw lever was in its proper place and position, and lying flat upon the cross-ties and away from the rails of the track, and that when the wheels of the tender of the engine passed over the rails and switch points in close proximity and immediately adjacent to the switch stand and as a direct result of the dangerous and defective "instrumentalities" described in the petition and the negligence and carelessness of the defendant the "throw lever of the switch was caused to violently move, swing, wave, flop, fly up and be thrown in plaintiff's direction suddenly and in an unexpected, abnormal, unexplainable, unusual and extraordinary manner and without the intervention of any human agency" (R. 7-8). Plaintiff had been familiar with the switch where he was injured for 18 years prior to the accident (R. 21).

At the trial of the cause plaintiff testified in detail as to the method of construction and operation of the switch involved, and his testimony closely followed the allegations in the petition above set forth as to method of construction and manner of operation (R. 22, 30, 33, 34, 35, 36, 39, 40, 46, 53, 54, 60, 61, 62, 65, 73). He personally had constructed a model of the track, switch, switch lever and all of the equipment and same was offered in evidence as plaintiff's Exhibit 3 at the trial of the cause. This exhibit and a working model of the switch offered in evidence by defendant as a part of the cross-examination of the plaintiff were before the

Supreme Court of Missouri at the time the cause was argued and submitted to that court under the following stipulation and agreement of the parties:

> "At the trial of the cause there was offered in evidence by both appellant and respondent working models of the railroad switch involved in this controversy. Due to the fact that it was and is impossible to reproduce said models in the abstract of the record in such a way or manner as the mechanics thereof could be fully explained and understood, it is agreed by the parties that the originals of said models will be produced in court at the oral argument of this cause and that the same may be considered a part of the record in this cause by the Supreme Court of Missouri and considered by the court in arriving at a decision in this cause."

Plaintiff testified that for 18 years he had passed over the switch every few days, was thoroughly familiar with the manner in which the switch was constructed, with the condition of the track leading up to the switch, with the condition of the switch and switch points and with the manner in which the switch operated (R. 54). As the engine upon which he was riding approached the switch he observed the points were properly aligned for the movement being made, in other words, for a movement of the engine and car toward the south end down the Brockett spur and with the west switch point away from the west rail and with the east switch point against the east rail (R. 29-31). His testimony was positive that due to the manner in which the switch was constructed the switch lever and ball necessarily moved in the same direction as the switch points and that if the switch points were to the east and properly set for the movement being made the ball would necessarily lie to the west and away from the track.

Upon direct examination he testified as an expert having 17 years experience it would have been impossible, in the event the switch was improperly set for the movement and the engine had "run through" the switch, for the ball to have been thrown toward the engine or toward the track; that if the switch had been set wrong for the movement, and with the points toward the west, and the engine had "run through" it, something would have had to have given and the switch points would have been thrown by the weight of the engine toward the east and that such movement of the points would have caused the lever and ball to move from the west to the east (R. 56).

He testified that after the accident the switch plate was pulled up at an angle of possibly 45 degrees and that the spikes which held the plate to the head block were sticking up (R. 33), but there was no evidence that such condition existed before the accident. The plaintiff testified that if the east wheels of the engine were on the east switch point and the west wheels on the west rail it would not be possible for the switch lever and ball to move toward the west unless the switch plate was defective and the switch points open (R. 74). There was no evidence that the switch plate at the time was defective and the plaintiff positively testified on several occasions during his testimony that the switch points were not open but were properly aligned and set for the movement which was being made (R. 22, 29, 31, 41, 55). Plaintiff further testified that if the switch points had not been properly aligned for the movement and the engine had "run through" the switch it would have been *impossible* for the ball to have been thrown toward the track or toward the west, and that it was *bound* to go to the east in that movement. His testimony was that the switch was on a curve, and in going around the

curve the weight of the engine would be thrown toward the left or east rail and point, and would exert pressure toward the east on the east point, and the flange of the wheels would crowd the east rail and point (R. 47).

Plaintiff offered in evidence the photograph which is attached to the opinion of the Supreme Court of Missouri (R. 336a). Respondent contended in the Supreme Court of Missouri that under plaintiff's own evidence in the case, under all the evidence in the case, and by reason of the facts disclosed by the various exhibits and the working models introduced in evidence by both plaintiff and defendant, plaintiff's testimony that the switch lever and ball moved from east to west was without any probative effect and was not entitled to credence because it contravened all laws of mechanics, was contrary to the known and admitted physical facts in the case, the known laws of mechanics, and inherently impossible.

A number of inaccurate statements appear in relator's statement of the case and in his argument in support of his petition for writ of certiorari. On pages 18 and 21 of relator's statement of the case reference is made to the fact that Dever testified that after the accident the spikes in the plate which held the switch plate to the head block were sticking up and the plate was raised to about a 45 degree angle.

On page 21 of the statement of the case it is recited that Dever had not noticed that the two spikes on the east end of the plate were up about 3 inches before the accident. There was no evidence whatsoever in the case to the effect that these two spikes were pulled before the accident and no evidence that the plate was in any wise loose or defective prior thereto. Dever testified that a movement of an engine over the switch could not have possibly caused any movement of the switch

lever from the east toward the west unless the switch plate was defective and the switch points open (R. 74). His positive evidence was that the switch points were not open but were properly aligned and set for the movement being made.

On page 23 of the statement of the case relator says that the wheels of locomotives, switch engines, and tenders become worn from constant use and flanges made thin. However, there was no evidence of any such condition in the locomotive and tender involved.

On page 31 of relator's statement of the case and on pages 39, 40 and 44 of the argument relator misquotes the testimony of respondent's witness Swearingen, and says that Swearingen testified that in making a test of the switch following the accident all of the spikes were pulled from the plate, the switch was set for proper movement over it and that when the engine passed through the switch the whole thing was pulled over to the west.

On page 44 of the argument relator quotes a portion of Swearingen's testimony but omits statements appearing on pages 286, 287 and 288 of the record which conclusively show that Swearingen testified directly opposite to what relator says he testified. Swearingen definitely testified that when the spikes were removed from the plate and the switch properly set for a southerly movement over it nothing happened when the engine passed through the switch, and the ball and lever were not thrown from the east to the west, and that such a thing could not have happened due to the manner in which the switch was constructed (R. 286, 287, 288).

POINTS OF FACT AND OF LAW AND GROUNDS URGED IN ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I. The writ should be denied for the reason that petitioner failed to serve on counsel for respondent a notice of the filing of the petition together with a copy of the petition, printed record and supporting brief within ten days after the filing thereof in this court in violation of the terms and provisions of Section 3, Rule 38 of this court.

II. The writ should be denied for the reason that neither petitioner's petition for writ of certiorari, nor the supporting brief are direct and concise and contain no direct, accurate or concise statement of fact in violation of Section 2, Rule 38 of this court.

III. In an action under the Federal Employers' Liability Act, an employee to be entitled to recover for injuries from his employer has the burden of establishing actionable negligence, either by direct proof or by reasonable inference, and when plaintiff's evidence in such a case fails to establish such negligence he is not entitled to recover and an instructed verdict should be given for the defendant.

Brady v. *Southern Ry. Co.*, 320 U. S. 476, 64 S. Ct. 232.

New Orleans & N. E. R. Co. v. *Harris*, 247 U. S. 67, 38 S. Ct. 535.

Pennsylvania R. Co. v. *Chamberlain*, 288 U. S. 333, 53 S. Ct. 391.

Galloway v. *United States*, 319 U. S. 372, 63 S. Ct. 1077.

IV. The testimony of the plaintiff Dever to the effect that the switch lever and ball was thrown from the east to the west, when the engine and tender were upon the switch points, being so contrary to physical facts as to be unbelievable could not be the basis of an inference of negligence, and Dever failed to prove actionable negligence. The Supreme Court of Missouri therefore properly ruled and held that he had failed to establish actionable negligence, and was not entitled to recover.

Atchison, T. & S. F. Ry. Co. v. *Toops,* 281 U. S. 351, 50 S. Ct. 281.

Jacobson v. *Chicago, M., St. P. & P. R. Co.,* 66 F. 2d 688.

Galloway v. *U. S.,* 130 F. 2d 467.

Galloway v. *U. S.,* 319 U. S. 372, 63 S. Ct. 1077.

Carter v. *Kurn,* 127 F. 2d 415.

Stolte v. *Larkin,* 110 F. 2d 226.

Pennsylvania R. Co. v. *Chamberlain,* 288 U. S. 333, 53 S. Ct. 391.

Roseman v. *United Rys. Co.,* 251 S. W. 104.

ARGUMENT.

I.

The petition should be denied because petitioner failed to comply with Rule 38 of this court.

Petitioner in violation of Section 3, Rule 38 of this court failed to serve on counsel for respondent a notice of the filing of the petition together with copy thereof, printed record and supporting brief within ten days after the filing thereof in this court, and has failed to include a direct and concise statement of the facts involved, either in his petition for certiorari or brief in support thereof, all in violation of Rule 38 of this court.

Section 2 of the revised Rule 38 of this court, adopted February 13, 1939, effective February 27, 1939, provides that a petition for certiorari shall contain a summary and short statement of the matter involved and that the supporting brief must be direct and concise. Neither the statement of fact contained in the petition, nor the statement contained in the supporting brief, comply with the provisions of paragraph 2 of said Rule 38 in that such statements are not direct, concise or accurate.

Furthermore, the petition for writ of certiorari in this cause was filed in this court on the 26th day of December, 1944. The ten day period for service of notice upon counsel for respondent, as provided for under Section 3, Rule 38, expired on January 5, 1945. Neither a notice of the filing of the petition for writ of certiorari, nor printed copies of the record and petition for writ of certiorari were served upon counsel for respondent until January 12, 1945. Section 3 of Rule 38 provides that notice of the filing of the petition together with a copy of

the petition, printed record and brief "shall be served by the petitioner on counsel for the respondent within ten days after the filing (unless enlarged by the court or a justice thereof when court is not in session) and due proof of service shall be filed with the clerk." Proof of service filed with the clerk in this cause shows that service was not had on counsel for respondent until January 12, 1945. So far as counsel for the respondent is informed, time for service was not enlarged by the court, and, if no order enlarging the time has been entered, the failure to give the notice within the prescribed time was a clear violation of Rule 38 and for that reason the petition should be denied.

II.

When plaintiff's evidence in an action under the Federal Employers' Liability Act fails to establish actionable negligence defendant is entitled to an instructed verdict.

In the recent case of *Brady* v. *Southern Ry. Co.*, 320 U. S. 476, 64 S. Ct. 232, this court reiterated the doctrine that where plaintiff's evidence in an action under the Federal Employers' Liability Act fails to establish actionable negligence the defendant is entitled to a directed verdict. In that case this court said:

> "When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims."

In the same opinion this court said relative to liability under the Act:

> "Liability arises from negligence not from injury under this Act. And that negligence must be the cause of the injury."

In the case of *Galloway* v. *United States*, 319 U. S. 372, 63 S. Ct. 1077, it was held that the granting of a defendant's motion for a directed verdict, where plaintiff's evidence was legally insufficient to sustain a verdict in his favor, was not erroneous, and did not in effect deprive the plaintiff of a trial by jury contrary to the 7th Amendment. In reference to the effect of the 7th Amendment this court in that case said:

> "If the intention is to claim generally that the Amendment deprives the federal courts of power to direct a verdict for insufficiency of evidence, the short answer is the contention has been foreclosed by repeated decisions made here consistently for nearly a century."

In discussing the standards of proof required for submission of a case to the jury, this court, in its opinion in that case, recognized the matter was essentially one to be worked out in particular situations and for particular types of cases, and in that connection said:

> "Whatever may be the general formulation, the essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked. The mere difference in labels used to describe this standard, whether it is applied under the demurrer to the evidence, or on motion for a directed verdict, cannot amount to a departure from 'the rules of the common law' which the Amendment requires to be followed."

In that case, this court affirmed the opinion and judgment of the United States Circuit Court of Appeals for the 9th Circuit in *Galloway* v. *United States*, 130 F. 2d 467,

and wherein it was ruled and held that evidence contrary to physical facts was without probative force and effect and insufficient to require a submission to the jury and that under such circumstances the giving of a directed verdict for a defendant was proper.

III.

Oral testimony in conflict with conceded physical facts has no probative value, and creates no inference of negligence.

In the case at bar plaintiff's cause of action was solely bottomed upon the contention that at the time the tender, upon which he was riding, approached and reached the switch and switch stand, the switch points were in proper position for the movement being made, with the switch lever and ball lying to the east and away from the track, and that as the tender reached the switch stand the lever and ball suddenly moved from the east toward the west and struck him while he was still upon the foot board of the tender.

He did not proceed upon any theory of negligence on the part of any member of the crew and cannot now be heard to say that he possibly made a case of submissible negligence on the theory that the switch was not properly set for the movement being made, and that the engine crew negligently "ran through" the switch. This is positively contrary to his own testimony, to the allegations contained in his petition and to the theory upon which he tried his law suit. He is as much bound by his trial theory in this court as he was in the Supreme Court of Missouri and in the trial court. It needs no citation of authority to sustain the rule that a plaintiff is bound by the same theory as to liability in this court as he adopted in the lower court.

It was the contention of the respondent in the trial court, and in the Supreme Court of Missouri, that plaintiff's testimony that the switch lever and ball moved from the east to the west, should, under plaintiff's own evidence in the case, his exhibits and the working models admitted in evidence, have been rejected and disregarded for the reason that it contravened all laws of mechanics, and was contrary to the known and admitted facts in the case, and the known laws of physics, and inherently impossible. The jury in the trial court returned a verdict for the defendant from which it may be inferred that the jury rejected plaintiff's oral testimony as being unworthy of belief because it was contrary to physical facts.

The Supreme Court of Missouri, upon a review of the whole record in the case, and having before it the photographs offered in evidence by the plaintiff, plaintiff's testimony as to method of construction of the switch, the working model offered in evidence by the plaintiff, and the working model offered in evidence by defendant, concluded, and properly so, that plaintiff's testimony to the effect that the switch lever was thrown from the east to the west was so contrary to physical facts as to be unbelievable and that such evidence would not support a verdict for the plaintiff, and should be disregarded.

There was no evidence of specific negligence.

While plaintiff testified that some of the working parts of the mechanism of the switch were loose and that the track were not in the same condition that a main line track would be in, he testified in the case that he had no exact knowledge of the reason for the alleged movement of the lever from the east to the west. He testified (R. 43) as follows:

"Q. Do you have any exact knowledge of the causes which operated to bring about the throwing of this

lever over towards you?
A. No, sir."

There was no evidence that the loose condition of the parts of the switch caused plaintiff's alleged injury.

In his petition, he alleged that the movement of the lever from east to west was unexplainable and without the intervention of any human agency (R. 9), and that he had no knowledge or means of knowing the cause or causes which operated to bring about the alleged unusual and extraordinary movement of the lever (R. 6). Unless negligence may be inferred from plaintiff's oral statement that the lever moved from east to west, then there was no evidence of negligence which proximately caused plaintiff's alleged injury.

Was plaintiff entitled to an inference of negligence under all of the admitted facts and circumstances in the record and under the physical facts? The Supreme Court of Missouri correctly answered this question in the negative. The manner in which the switch was constructed, the way and manner in which the switch lever was connected with the switch points, and in which it operated was definitely described and set forth in plaintiff's petition. At the trial of the cause he testified with definiteness and certainty as to the manner in which it operated.

Prior to the trial of the cause he had constructed a working model of the switch which was introduced in evidence as plaintiff's Exhibit 3. The defendant also offered in evidence a working model of the switch. Both of these models were before the Supreme Court of Missouri under an agreement of parties that the same might be considered as a part of the record in the cause and considered by the court in arriving at a decision. There was no dispute at the trial as to the way and manner in which the switch was constructed. The two switch points were connected with

each other and with tne switch lever so if the switch ball was moved from the east to the west the switch points necessarily had to move in the same direction. It was likewise undisputed that the construction of the switch was such that if the switch points were moved from the west to the east the switch lever and ball necessarily both moved in the same direction and could move in no other direction. The plaintiff's own testimony, his working model and that of the defendant clearly established the correctness of the foregoing position.

The plaintiff testified that the points and lever always moved in the same direction (R. 22). The switch and tracks in question are shown in plaintiff's exhibit 7, which is attached to the opinion of the Supreme Court of Missouri (R. 163, 336a). Said exhibit was made from a point south of the switch in question looking toward the north. The track on the right side of the picture upon which the box car is standing was the track known and referred to in evidence as the Drake spur. The track just to the left was known and referred to as the Brockett spur and extended on to the south of the switch in question.

The engine involved in the movement being made at the time of plaintiff's alleged injury was being moved south over the Brockett spur. The intention was to proceed south over the Brockett spur until the car which was attached to the front end of the engine had cleared the Drake spur switch point, as shown in the center of the picture, and then to move in a northerly direction onto the Drake spur and to spot the car on that spur near the place where the car is shown in the picture.

In a southerly movement over the Brockett spur, the tender and engine would be upon the rails of the Brockett spur until they reached the switch. The west wheels of the engine and tender would then follow the west rail of the Brockett spur track and the east wheels

would follow the east rail. When the wheels on the left or east side of the tender reached the easterly switch point they would follow that switch point to the place where it was connected with the solid rail, shown on the east or right side of the picture, which constituted the east rail of the Drake spur, to the south end of the switch point and which thereafter became the east rail of the Brockett spur.

Plaintiff testified that as the tender approached the switch points he could see that said points were properly aligned for the movement, that is a movement down past the switch on the Brockett spur (R. 41). He testified that a proper position for a southerly movement through the switch, over the Brockett spur track, required that the points should be to the east (R. 22-29-31). In plaintiff's exhibit No. 7 the points are in such position. Plaintiff further testified that he saw the opening between the west rail and the west switch points and that the track and switch points were properly aligned for the movement (R. 55). As the tender moved toward the south, the wheels on the east side, after they reached the north end of the east switch point, necessarily had to travel along said switch point and the wheels on the west side of the tender necessarily had to travel along and upon the west rail of the Brockett spur. The flanges of the wheels on the east side of the tender were to the west of and thrown against the east switch point (R. 47). The flange on the wheels on the west side of the tender, if the west switch points were open and properly aligned for the movement, as plaintiff stated they were, would be to the east of the west rail of the Brocket spur and pass between that rail and the west switch point. The first set of wheels on the tender were about 18 to 20 inches to the north of the foot board, as the tender pro-

ceeded in a southerly direction, and the second wheels 3 1/2 feet to the north of the first wheels (R. 59).

Plaintiff testified that in going around a curve, like the one at the switch involved, the flanges of the left or east wheels of the engine or tender would be thrown against the left or the east rail or switch point (R. 47), and when the wheels touched the point where they would necessarily exert pressure against it in an easterly direction. The plaintiff testified that had the switch not been properly aligned for the movement and had the west switch point been against the west rail and the east switch point away from the east rail and the switch had thus been "run through," the ball was bound to go to the east, and that under such circumstances it would have been impossible for the ball to have been thrown toward the engine, or in a westerly direction toward the track. Of course, this statement was true for the reason that if the east switch point was away from the east rail the tremendous pressure asserted against it by the wheels of the tender and the engine could not push it in any direction except to the east.

If the switch points were in the position which plaintiff testified they were, as the tender approached the switch, then the switch lever and ball could not have possibly been thrown from the east to the west as plaintiff testified it was. Such a movement of the ball was contrary to the known laws of physics and was inherently impossible. If the west wheels of the tender were upon the west rail, and the east switch point was to the west of the east rail and not against said rail, the east wheels of the tender and engine would exert pressure from the west to the east. If the switch points were properly adjusted for the movement being made, as plaintiff said they were, then as the tender entered and started to pass through the switch the west wheels would

be upon the west rail of the Brockett spur and the east wheels upon the east switch point and the flange of the wheels would be against and to the west of this east switch point and asserting pressure from west to east thereon. Of course, the gauge of the wheels is necessarily the same as that of the track. Plaintiff testified that the standard gauge was 4 feet 8 1/2 inches (R. 73).

The switch points and the switch lever were so connected that the lever could not move unless the points moved. As the engine went through the switch no force could be asserted against the rail of the track or the switch points except the force asserted through the wheels of the engine and tender. One switch point could not move unless the other moved and the switch lever and ball could not move from the east toward the west unless both switch points moved in that direction.

Under the known laws of physics it was utterly impossible, due to the manner in which the switch was constructed, for the switch points to move from east to the west as the tender passed in a southerly direction through the switch.

This, for the reason that pressure was asserted by the wheels of the tender on the east switch point in an easterly direction. No part of the ball or flat surface of the wheel could possibly touch the west switch point, because, if the switch point was open, and properly aligned for the contemplated movement, it was pulled away from the west rail a distance of several inches. The flat part or ball of the wheel was upon the west rail and the flange of the wheel would pass between the rail and the switch point and to the west of the point. No possible force could thus have been asserted upon the switch point to pull it in a westerly direction. Even though the flange came in contact with

the west switch point the force exerted would be from the west to the east and not from the east to the west. The situation was such that constant pressure from west to east was being applied to the east switch point if it was against the east rail and properly aligned for the movement, as plaintiff testified it was. Such being the case, there was no possible way in which the switch ball or lever could have moved from the east to the west as plaintiff testified it did.

Plaintiff's testimony was so contrary to the conceded physical facts as to be inherently impossible, and should therefore be rejected and disregarded, and plaintiff was not entitled to an inference of negligence.

In the case at bar, the oral statements of plaintiff to the effect that the switch lever suddenly flew from the east toward the west, when the trucks of the tender were upon the east switch point, must be viewed in the light of all the surrounding facts and circumstances. The physical facts, as established by plaintiff's own testimony, concerning the manner of the construction and operation of the switch, his own working model, and the photographs introduced in evidence by him absolutely negatived and destroyed the force of his oral statements that the switch lever and ball suddenly moved from the east toward the west, and such statements do not amount to any substantial evidence of the alleged facts to which they relate.

If the west wheels of the tender were upon the west rail of the Brockett spur as the tender entered the north end of the switch, and plaintiff and all other witnesses said they were, then the east wheels of the tender were riding upon the east switch point of the switch. The only possible pressure which could be asserted thereon would be the pressure of the east wheels of the tender and that pressure would be from the west toward the

east. There was no possible way for the switch point to move from the east to the west, and without such movement of the point the switch lever and ball could not move from the east to the west.

Plaintiff testified that the switch lever and ball moved from the east to the west just as the foot board upon which he claims to have been standing was directly opposite the lever. He further testified that the first set of wheels on the tender were 18 to 20 inches to the north of the foot board (R. 59), and that the second set of wheels were 3 1/2 feet to the north or rear of the first wheels (R. 59); that when the wheels reached the points they would necessarily exert pressure; that the switch points were 8 feet long (R. 57).

It will thus be seen that when the foot board was even with the switch lever, two wheels of the tank were riding upon the east point and asserted pressure in an easterly direction thereon. The flange of these left wheels were thus thrown against the left or east rail or switch point (R. 47). The plaintiff's statement that the switch throw lever flew from the west to the east was absolutely negatived by his own oral testimony. We quote from page 74 of the abstract:

> "Q. I want you to tell the jury whether if the wheels are on the east switch point and on the west rail of that track, if it would be possible for that ball to flop over toward the west?
> A. Not unless the switch plate was defective, *and the switch points open*" (Italics ours).

There was no evidence that the switch plate at the time was defective and plaintiff positively testified on several occasions during his testimony that the switch points were not open but were properly aligned and set for the movement which was being made (R. 55, 41, 22,

29-31). Furthermore, plaintiff testified that if the switch had been improperly set for the movement being made and the engine and tender had "run through" the switch the effect would have been to throw the switch lever and ball from the west toward the east. This statement was true, due to the manner in which the switch was constructed. Under such circumstances, the flange on the west wheels of the tender would necessarily have to pass between the west switch point and the west rail, the face or ball of the wheel being upon the west rail, and the flange on the west side thereof. This would have exerted a pressure from the west toward the east against the west switch point. Under such circumstances the east wheels of the tender would have been upon the east switch point with the ball of the wheel upon the point and the flange to the west of the point. The pressure necessarily exerted would have been from the west toward the east. Plaintiff testified that under such circumstances it would have been *impossible* for the ball to have been thrown toward the track or toward the west (R. 30). He testified (R. 30):

> "Q. I want you to tell the jury what happens when you run through one of these switches that is operated by a ground throw ball, tell what happens to the ball?
> A. If the ball goes in any direction at all it goes away from the track, *bound to go to the east in that movement.*
> Q. I want you to tell the jury, as a switchman of seventeen years experience, if it would be possible, if you run through that switch, for that ball to have been thrown toward the engine or toward the track?
> A. *No, sir, impossible.*"

Of course, it was impossible, for the reason that the pressure exerted on the switch points was from the

west toward the east. For the same reason it was impossible for the lever and ball to move or be thrown from the east toward the west, if the switch was properly aligned for the movement as plaintiff testified it was. The same laws of physics which apply to one situation apply with like force and effect to the other. In one case the ball could not move from the east to the west, and would be thrown from the west to the east by reason of the tremendous pressure being asserted against the switch points by the wheels of the engine and tender. Having once been thrown from the west to the east, it could not again move from the east to the west as long as the wheels were upon the point for the reason that the pressure was necessarily continuous. Plaintiff testified as follows (R. 56):

"Q. And if that switch point was thrown toward the east it would necessarily carry with it an eastern movement of this ball like that, wouldn't it?
A. Yes, sir."

He further testified (R. 59):

"Q. And those wheels as they touched this point, would necessarily exert pressure on the point, wouldn't they.
A. Yes, sir.
Q. And would have a tendency to force the point over toward the east?
A. That point was already to the east."

He further testified (R. 47):

"Q. If you are going around here in an engine like this, around a curve like this, isn't the weight of the engine thrown toward the left rail, if you are going in this direction?
A. Yes, sir, this flange will crowd this rail.
Q. Will crowd the left-hand rail?
A. Yes, sir.

Q. So that at this switch in question, this track curved toward the left, as it came around the curve the flange of the engine would be thrown toward the left or east rail, wouldn't it?
A. Yes, sir.
Q. You would be thrown against the left rail or the east rail?
A. Yes, sir."

From these statements, it will thus be seen that plaintiff's testimony that the ball moved from the east toward the west at a time when the wheels of the tender were upon the west rail of the Brockett spur and the east switch point, was directly contrary, not only to the physical facts and laws of physics as disclosed by the exhibits in the case, but contrary to plaintiff's own oral testimony. After plaintiff's injury, the engine and tank proceeded on south over the switch and came to a stop at a point where the gangway between the tank and engine was directly opposite the plaintiff (R. 32). Plaintiff fell in a little ditch a few feet south of the switch. All of the wheels of the tank therefore necessarily passed through the switch before the stop was made. The west wheels of the tank necessarily had followed the west rail of the Brockett spur, and the east wheels had necessarily followed the east switch point and at the south end thereof passed to the east rail of the Brockett spur, which, to the north of the switch point became the east rail of the Drake spur. This conclusively establishes that at all times the east switch point was in its proper position against the east rail. If the east and west wheels of the tank had not followed the course above indicated the tank would necessarily have been derailed, and the evidence was conclusive that no such thing occurred.

The fact that connections between the switch points and the switch throw lever, as testified to by the plain-

tiff, may have been loose or worn in no wise alters the situation or changes the physical laws involved. Plaintiff claims that the throw lever moved without the intervention of human agency. Under the manner in which the appliance was constructed, the only force which could move the switch lever and ball from east to west was a movement of the switch points from the east to the west. The only force which could effect a movement of the switch points from east to west was that exerted by the wheels of the tank. If the pressure was from east to west, as plaintiff testified, then looseness of connections could in no wise change the direction of pressure and plaintiff's testimony in regard to loose connections in no wise alters the situation.

The admitted physical facts in the case and plaintiff's oral testimony refuted any inference which might in the absence of such physical facts have been drawn. Plaintiff's testimony that the ball and lever moved from the east to the west, being contrary to physical facts, was not sufficient to create an inference of negligence. *Galloway* v. *United States,* 319 U. S. 372, 3 Sup. Ct. Rep. 1077; *Galloway* v. *United States,* 130 F. 2d 467. The testimony of the plaintiff that the ball moved from the east to the west, in the light of conceded physical facts, was not such evidence from which an inference could reasonably be drawn that the alleged injury suffered by the plaintiff was caused by the negligence of the respondent. Plaintiff's evidence to the effect that some of the switch connections were loose and not up to standard for a main line track was not sufficient to make a submissible case for him for the reason that there was no evidence that such condition was the cause of his injury.

In the case of *Atchison, T. & S. F. Ry. Co.* v. *Toops,* 281 U. S. 351, 50 S. Ct. 281, this court declared:

> "But proof of negligence alone does not entitle the plaintiff to recover under the Federal Employers' Liability Act. The negligence complained of must be the cause of the injury. The jury may not be permitted to speculate as to its cause, and the case must be withdrawn from its consideration, unless there is evidence from which the inference may reasonably be drawn that the injury suffered was caused by the negligent act of the employer."

The conclusion of the Supreme Court of Missouri that oral testimony which is so contrary to physical facts as to be unbelievable is lacking of probative force is in strict accord with the rule followed by the federal courts.

In the case of *Jacobson* v. *Chicago, M., St. P. & P. R. Co.*, 66 F. 2d 688 (C. C. A. 8), the court declared, l. c. 693:

> "This testimony is in conflict with the physical facts and scientific principle, and hence is lacking in all probative force. *United States* v. *Harth*, (C. C. A. 8) 61 F. 2d 541; *United States* v. *McGill*, (C. C. A. 8) 56 F. 2d 522; *Ed S. Michelson, Inc.*, v. *Nebraska Tire & Rubber Co.*, (C. C. A. 8) 63 F. 2d 597; *Liggett & Myers Tobacco Co.* v. *DeParcq*, (C. C. A. 8) 66 F. 2d 678."

The Jacobson case involved an action under the Federal Employers' Liability Act.

In *Galloway* v. *United States*, 130 F. 2d 467, the Circuit Court of Appeals for the Ninth Circuit said:

> "It is an accepted rule that if the evidence presented by a party is positively contradicted by the physical facts, neither the court nor the jury is permitted to give it credence. *Deadrich* v. *United States*, 9 Cir., 74 F. 2d 619, 622. If the testimony introduced here by the plaintiff were contradicted by the

> physical facts, the trial judge was bound to direct a verdict for defendant."

The judgment of the Ninth Circuit Court of Appeals in that case was affirmed by this court in *Galloway* v. *United States*, 319 U. S. 372, 63 S. Ct. 1077.

In *Carter* v. *Kurn*, 127 F. 2d 415 (8th Circuit), the court declared:

> "Oral testimony loses its probative force when contradicted by admitted physical facts."

In *Stolte* v. *Larkin*, 110 F. 2d 226, the court stated:

> "As a rule of law, it is true that where undisputed physical facts are entirely inconsistent with and opposed to testimony necessary to make out a case for the plaintiff, the physical facts must control. No jury can be allowed to return a verdict based upon oral testimony which is flatly opposed to physical facts, the existence of which is thus established. *Elzig* v. *Gudwangen*, 8 Cir., 91 F. 2d 434, 440."

In the opinion of this court in the case of *Pennsylvania R. Co.* v. *Chamberlain*, 288 U. S. 333, 53 S. Ct. 391, the same rule, in effect, was applied. In the opinion in that case this court said:

> "It is well settled that, where plaintiff's case is based upon an inference or inferences, the case must fail upon proof of undisputed facts inconsistent with such inferences."

In the case at bar, the undisputed facts utterly destroyed any inference of negligence which might ordinarily have been drawn from plaintiff's oral testimony that the switch lever moved from the east to the west when the weight of the engine was upon the switch points. Plaintiff's oral testimony being unbelievable, be-

cause in direct conflict with physical facts, was not sufficient upon which a verdict in his favor might have been based. In the case just cited this court further declared:

> "Not only is Bainbridge's testimony considered as a whole suspicious, insubstantial, and insufficient, but his statement that when he turned shortly after hearing the crash the two strings were moving together is simply incredible, * * * At that sharp angle and from that distance, near dusk of a misty evening (as the proof shows), the practical impossibility of the witness being able to see whether the front of the nine-car string was in contact with the back of the two-car string is apparent. And, certainly, in the light of these conditions, no verdict based upon a statement so unbelievable reasonably could be sustained as against the positive testimony to the contrary of unimpeached witnesses, all in a position to see, as this witness was not, the precise relation of the cars to one another."

In that case this court approved the action of the trial court in withdrawing the case from the jury and held that the plaintiff was not entitled to the benefit of inferences, which had to be drawn from testimony contrary to physical facts, and held that a verdict under the Federal Employers' Liability Act must be based upon substantial evidence and not upon mere speculation and conjecture, and in that connection said:

> "Leaving out of consideration, then, the inference relied upon, the case for respondent is left without any substantial support in the evidence, and a verdict in her favor would have rested upon mere speculation and conjecture. This, of course, is inadmissible."

The opinion and decision of the Supreme Court of Missouri, in the case at bar, is directly in line with the

decision of this court just referred to and said decision is full authority for the position taken in the Supreme Court of Missouri.

The established rule in Missouri relative to oral testimony contrary to physical facts was very aptly stated by the St. Louis Court of Appeals in the case of *Roseman v. United Railways Co. of St. Louis*, 251 S. W. 104, in the following language:

> "It has been repeatedly ruled that, when the testimony of a witness upon a material issue is contrary to the physical facts, or when such testimony necessarily relied upon is inherently impossible, or the inferences deducible therefrom are so opposed to all reasonable probability as to be manifestly false, the courts are not bound to stultify themselves by giving credence to such testimony, but will wholly disregard it."

The oral testimony of the plaintiff in the case at bar was so opposed to the conceded physical facts in the case as to be manifestly false and therefore could not be the basis of an inference of negligence. Without the benefit of such an inference, plaintiff's case wholly failed, and a verdict or judgment in his favor could have been based upon nothing more than guess, speculation and conjecture. He totally failed to prove actionable negligence which directly caused his alleged injury. Under such circumstances, the Supreme Court of Missouri correctly ruled and held that he had failed to make a submissible case and that the verdict of the jury in favor of the defendant should be ordered reinstated.

In petitioner's brief filed in this court in support of his application for certiorari he devotes many pages of argument in an attempt to show how plaintiff's statement to the effect that the lever and ball moved from

the east to the west might possibly be true. However, such argument is based on nothing more than guess or speculation and ignores plaintiff's own evidence and the physical facts in the case which conclusively established that, with the weight of the engine on the east switch point and exerting a force from the west to the east thereon, neither the switch points, nor the ball and lever, could possibly have moved from the east to the west.

Conclusion.

It is therefore respectfully submitted that the verdict of the jury and the judgment of the Supreme Court of Missouri were for the right party, that under the law the Supreme Court of Missouri properly ruled and held that the plaintiff was not entitled to recover, and that such judgment and decision is in full accord with the rules and opinions of this court and of the various circuit courts of appeal, and that no rights of the plaintiff were violated by the Supreme Court of Missouri and, therefore, relator's petition for writ of certiorari should be denied.

Respectfully submitted,

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